

PROBATE CORNER

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ARTICLE: Proper Use Of Gifting Powers Under A Durable Power Of Attorney

Chapter 709 entitled “Powers Of Attorney And Similar Instruments” (effective October 1, 2011) reads in relevant part:

709.2202 Authority that requires separate signed enumeration.—

(1) Notwithstanding s. 709.2201, an agent may exercise the following authority only if the principal signed or initialed next to each specific enumeration of the authority, the exercise of the authority is consistent with the agent’s duties under s. 709.2114, and the exercise is not otherwise prohibited by another agreement or instrument:

* * * *

(c) Make a gift, subject to subsection (3);

* * * *

(2) Notwithstanding a grant of authority to do an act described in subsection (1), unless the power of attorney otherwise provides, an agent who is not an ancestor, spouse, or descendant of the principal may not exercise authority to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal’s property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

(3) Unless the power of attorney otherwise provides, a provision in a power of attorney granting general authority with respect to gifts authorizes the agent to only:

(a) Make outright to, or for the benefit of, a person a gift of any of the principal’s property, including by the exercise of a presently exercisable general power of appointment held by the principal, in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion under 26 U.S.C. s. 2503(b), as amended, without regard to whether the federal gift tax exclusion applies to the gift, or if the principal’s spouse agrees to consent to a split gift pursuant to 26 U.S.C. s. 2513, as amended, in an amount per donee not to exceed twice the annual federal gift tax exclusion limit; and

(b) Consent, pursuant to 26 U.S.C. s. 2513, as amended, to the splitting of a gift made by the principal’s spouse in an amount per donee not to exceed the aggregate annual gift tax exclusions for both spouses.

An agent may exercise the authority to make a gift only if the principal signed or initialed next to a specific enumeration giving the agent the authority to make a gift. Pursuant to subparagraphs (2) and (3) above, the principal may expand the gifting powers beyond those stated in the statute by signing or initialing next to a specific enumeration giving the agent those powers. For example, the principal may give an agent who is not an

ancestor, spouse, or descendant unlimited gifting powers to make gifts to himself. However, use of the gifting powers beyond those referenced in (3)(a) and (b) could be problematic for the agent, especially if the gifts are made to himself.

For example, in Siegel v. JP Morgan Chase Bank, 2011 Fla. App. Lexis 16365 (Fla. 4th DCA October 19, 2011), the court found that the following principles apply in determining whether an agent under a Florida durable power of attorney breached his fiduciary duty by making gifts. The relevant portion of the opinion reads:

While not directly on point, *In re Francis*, 19 Misc. 3d 536, 853 N.Y.S.2d 245 (N.Y. Sur. 2008), is an example of the misuse of a power to gift by an attorney-in-fact. There, a 98-year-old woman gave a power of attorney to her neighbor. The instrument included a broad power to make gifts, including gifts to the attorney-in-fact. The neighbor then used this power, transferring all of the woman's accounts and property to himself. After her death, when her heirs sued to set aside the transfers, the attorney-in-fact defended based upon the provision of the power of attorney absolving the attorney-in-fact of all liability to her estate or heirs for any act done under the power of attorney. The court rejected this claim. In doing so it noted:

Respondent's use of the POA is a classic example of how such an instrument may be abused by an attorney-in-fact for his personal benefit. At his deposition respondent admitted that he transferred to himself or his mother virtually all of decedent's liquid assets and secured a life tenancy in the real property.

19 Misc. 3d at 541. The court concluded that a clause which seeks to exonerate an attorney-in-fact from any and all liability runs afoul of the spirit of New York's public policy and the duty of an attorney-in-fact as established under *Ferrara* [*Matter of Ferrara*, 7 N.Y.3d 244, 819 N.Y.S.2d 215, 852 N.E.2d 138 (2006)]. *Ferrara*, in turn, held that an attorney-in-fact must act in the best interests of the principal, which is consistent with the fiduciary duties that the courts have imposed on the attorney-in-fact.

"[A] power of attorney ... is clearly given with the intent that the attorney-in-fact will utilize that power for the benefit of the principal" (*Mantella v. Mantella*, 268 A.D.2d 852, 852, [701 N.Y.S.2d 715] [3d Dept. 2000] [internal quotation marks and citation omitted]). Because "[t]he relationship of an attorney-in-fact to his principal is that of agent and principal ..., the attorney-in-fact must act in the utmost good faith and undivided loyalty toward the principal, and must act in accordance with the highest principles of morality, fidelity, loyalty and fair dealing" (*Semmler v. Naples*, 166 A.D.2d 751, 752, [563 N.Y.S.2d

116] [3d Dept.1990] [internal quotation marks and citations omitted]).

Ferrara, 7 N.Y.3d at 254; 852 N.E.2d at 144. Although the power of attorney in this case was a Florida durable power of attorney, Florida law states that an attorney-in-fact must exercise the powers conferred as a fiduciary. See, e.g., *In re Estate of Schriver*, 441 So. 2d 1105 (Fla. 5th DCA 1983); § 709.08(8), Fla. Stat. (2011). Therefore, the principles of the foregoing case are applicable as they also consider an attorney-in-fact a fiduciary.

Based on the above, it is reasonable to conclude that giving an agent unlimited gifting powers to make gifts to himself may be considered a conflict of interest, in which case the agent would have the burden of proving, by clear and convincing evidence that he acted: (a) Solely in the interest of the principal; or (b) In good faith in the principal's best interest, and the conflict of interest was expressly authorized in the power of attorney. Refer to §709.2116(4), Fla. Stat.